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No. 98-260

In The

Supreme Court of the United States

October Term, 1997

ELLEN BYRD and VIVIEN HARKNESS,

Petitioners,

v.

VIC CANTU, MARK VAN HOLT, and CITY OF LOS ALAMITOS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it an abuse of discretion for the district court to deny representative capacity standing to a Plaintiff who, in a 42 U.S.C. § 1983 action, omits such capacity from the controlling pretrial order under *F.R.Civ.P.*, Rule 16?

2. Does a surviving spouse or parent of an adult child in a 42 U.S.C. § 1983 action arising out of the alleged use of excessive deadly force by police have standing to bring a separate and distinct claim for loss of a familial relationship under the substantive due process component of the 14th Amendment? If so, are such separate claims analyzed under the "deliberate indifference" standard of the 14th Amendment or the "reasonableness" standard of the 4th Amendment?

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STATEMENT

Although Respondents would agree that the facts must be viewed in light most favorable to Petitioners, the evidence should not be viewed to the exclusion of undisputed evidence which represents a more balanced statement of the case.

On January 23, 1993, several neighbors of Ellen and Sylvan Byrd, a married couple, called 911 to report a domestic disturbance. Respondent Los Alamitos Police Officers Vic Cantu and Mark Van Holt, in full police uniform, responded to the call at the Byrd's upstairs apartment. When Officer Cantu first arrived outside the closed door of the apartment, he heard a woman crying inside and a male voice say, "I don't want to hurt you again". Once Officer Van Holt arrived, Officer Cantu knocked on the front door and placed his hand over the peephole for officer safety reasons and due to a lack of available cover.

Sylvan and Ellen Byrd looked at each other and, without either of them saying a word, Sylvan retrieved a loaded handgun from a hall closet while Ellen instinctively retreated to the kitchen which she felt would be a "safer place". Sylvan opened the front door somewhere between 10 to18 inches, holding his gun concealed behind his right thigh. Officer Cantu greeted Sylvan with a casual "Hello", however received no verbal response from Sylvan who simply stared at the two uniformed officers.

Without yet drawing their service weapons, both officers became increasingly concerned about the fact that Sylvan Byrd was saying nothing and keeping his right

hand conspicuously concealed behind his right leg. Because both officers knew that an individual's hands are the most critical factor for officer safety, Officer Cantu asked and then demanded "Let me see your hand". Contrary to Petitioners' contention that this was tantamount to telling Sylvan Byrd to "point a gun" at officers, Officer Cantu testified that, even if the individual actually had a gun, he reasonably expected that the person would simply say so and perhaps ask for further direction.

Nonetheless, without saying a word, Sylvan Byrd raised his right hand and pointed a fully loaded handgun, safety off, with his finger on the trigger at Officer Van Holt who was standing on the stairway.[1] When Officer Cantu saw the weapon pointed at his partner, he immediately kicked the door, withdrew his own service weapon and began firing. Once Officer Van Holt also saw Sylvan pointing a handgun at him, he also withdrew his service weapon and began firing. Sylvan Byrd died of gunshot wounds.

Although not mentioned by Petitioners, it will become important to note that their own experts at trial, Dr. James Fyfe and Mr. Klinger, opined that the conduct of the officers was, at most, unreasonable. Dr. Fyfe also acknowledged previous comments made by Sylvan Byrd that he "wanted to go out in a blaze of glory" and that "if the police come, (he'll) be ready for them", all indicative

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[1] While Ellen Byrd testified that she never noticed the gun rise from Sylvan's side prior to the shooting, she admitted that she was so focused on her husband's body instead of the gun that she never even heard the undisputed commands given by officers and heard by several neighbors.

of the recognized syndrome commonly known as "suicide by cop".

Procedurally, Respondents would agree that Petitioners identified themselves in their Second Amended Complaint as, respectively, Ellen Byrd and Vivien Harkness, the spouse and the mother of the deceased. However, Petitioners must also admit that they completely failed to allege that they were decedent's successors in interest as mandated by the controlling California law and which would entitle them to bring suit in any sort of representative capacity.

Respondents would also agree that Petitioners' lack of standing to act as heirs to decedent was appropriately raised as a twenty-seventh affirmative defense in the answer, pursuant to *F.R.Civ.P.*, Rule 9(a). Respondents cannot agree, however, that the thirtieth affirmative defense regarding nonmembership in any protected class even remotely related to some sort of separation of survival claims from individualized claims. On the contrary, the thirtieth affirmative defense was raised to address any potential claim of discrimination.

Most importantly, it is critical to note that Petitioners have conveniently provided this Court with only a small and misleading portion of the governing pretrial order (see: Appendix E to Petition). By providing only that portion of the pretrial order which attempts to incorporate the entire second amended complaint, Petitioners claim that they successfully set forth their intention to act in a representative capacity. Once again, however, the second amended complaint says no such thing.

Respondents, on the other hand, have provided this Court with the remaining relevant portions of the pretrial order upon which the district court and Ninth Circuit rendered their decisions. (Appendix 1). Nowhere in the controlling pretrial order (prepared by Petitioners) is there even a remote reference to Petitioners' standing or representative capacities remaining to be litigated. As evidenced by the answer to the second amended complaint, Respondents certainly never stipulated to these issues.

During the trial, Petitioners expressly relied on a representation to the court that there was "no survival claim" in order to preclude Respondents from offering certain evidence. Even at the close of evidence, Petitioners again confirmed to the court that they were not asserting their own 4th Amendment claims. It was only after the court declared a mistrial and invited summary judgment on the issue of standing that Petitioners did a complete turnaround by attempting to establish some sort of 4th Amendment survival action which had never previously been alleged.

The district court ruled that Petitioners had failed to properly allege their representative capacities to bring a survival action for a 4th Amendment claim on behalf of decedent in either the second amended complaint or the controlling pretrial order. The district court did, on the other hand, permit Petitioners to retain their separate and distinct 14th Amendment claims for loss of a familial relationship with decedent. However, the district court determined that the standard applicable to the 14th Amendment claims was "deliberate indifference" and that Petitioners had failed to meet their burden of proof

on those claims. Consistent with all applicable law, the Ninth Circuit appropriately upheld the decisions of the lower court.

REASONS FOR DENYING THE PETITION

1. Petitioners' lack of standing resulted from an individualized failure to comply with the procedural requirements of *F.R.Civ.P.*, Rule 16. Consistent with all existing law, the Ninth Circuit appropriately found that the district court's application of Rule 16 was not an abuse of discretion.

2. The district court and the Ninth Circuit properly separated Petitioners' independent 14th Amendment claims for loss of a familial relationship from any separate and distinct survival action alleging excessive force under the 4th Amendment.

3. The district court's and Ninth Circuit's applications of a "deliberate indifference" standard to Petitioners' separate and distinct 14th Amendment claims for loss of a familial relationship were consistent with the history and precedent of this Court.

4. There is no conflict among the courts of appeal on the issues presented.

SUMMARY OF ARGUMENT

In their initial pleadings, Petitioners arguably stated facts sufficient to have standing to bring separate claims in their own right. However, they completely failed to

incorporate allegations that either or both of them had standing to act as "successors in interest" to the decedent as mandated by controlling state law. As the litigation proceeded, Petitioners again failed to even elude to any intention to stand in any sort of representative capacity for the decedent. Finally, at trial, Petitioners took advantage of the lack of any survival action to exclude evidence offered by Respondents. At trial, Petitioners also acknowledged that there were no survival actions.

Although Petitioners now ask this Court to retrospectively save them from their own tactical decisions, the district court exercised its sound discretion to determine that Petitioners' decisions did not comport to the applicable Federal Rules of Civil Procedure. The Ninth Circuit reviewed the district court's decision *de novo* and it has rarely, if ever, been the role of this Court to provide a third level of review for such personalized tactical errors.

However, notwithstanding the procedural issues raised in the Petition, the issue remains whether or not a surviving spouse and/or the mother of an adult child have separate standing to bring their own constitutional claims for loss of a familial relationship under the substantive due process component of the 14th Amendment. On this issue, the district court properly followed precedent within the circuits and determined that Petitioners did, in fact, have standing to maintain their own independent constitutional claims.

Once again, adhering to the history of the 14th Amendment and the holdings of this Court, the district court and the Ninth Circuit analyzed Petitioners' separate 14th Amendment claims under the applicable standard of

"deliberate indifference". Viewing the evidence most favorably to the Petitioners, the district court determined that Petitioners had failed to meet their burden of proof.

ARGUMENT

1. THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN APPLYING THE CONTROLLING FEDERAL RULES OF CIVIL PROCEDURE.

Perhaps recognizing that their procedural argument is the least likely issue for this Court to review, they have saved it for last. Since this may be true, the procedural issues raised in the Petition should be addressed first as they may be dispositive to the case.

Petitioners' entire procedural argument erroneously focuses on the application of *F.R.Civ.P.*, Rule 8, which is the point at which they claim that the "issue should begin and end". Unfortunately, the application of Rule 8 was never raised in their opening brief on appeal and it was not addressed by the Ninth Circuit. Ordinarily, this Court does not decide questions not raised or resolved in the lower court(s). *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646, 112 S.Ct. 1644, 1649, 118 L.Ed.2d 280 (1992).

However, even if this Court wishes to review Petitioners' argument that they somehow met the liberalized pleading standards of Rule 8, their position is without merit. Petitioners argue, and Respondents do not dispute, that a survival action under 42 U.S.C. § 1983 exists when authorized by applicable state law. *Smith v. City of Fontana*, 818 F.2d 1411, 1416 (9th Cir. 1987), *cert. denied*, 484

U.S. 935 (1987). Under the California law controlling one's ability to bring a survival action, Petitioners did not even remotely, much less substantially, comply with the mandatory provisions of *Code of Civil Procedure* § 377.32 which provides in pertinent part:

> (a) The person who seeks to commence an action . . . as the decedent's successor in interest *shall* execute an affidavit stating:
>
> (5)(A) The affiant is the decedent's successor in interest and succeeds to the decedent's interest in the action.

Petitioners' reliance on the minimal averment in the second amended complaint to the effect that Ellen Byrd is the spouse and Vivien Harkness is the mother of decedent does not establish that they are the decedent's sole successors in interest. Not only might decedent have a child who would supersede these parties, the mother of an adult child has no standing as a successor in interest when others precede her unless she alleges that she was financially dependent on decedent. *California Code of Civil Procedure* § 377.60(b).

The liberalized pleading standards of Rule 8 were never intended to avert the need to properly invoke the jurisdiction of the federal courts. *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989). As Chief Justice Burger noted "it is not too much to ask that if a person or the entity is to be subject to suit, the person should be properly named . . . it is a dubious business to encourage such shoddy pleading practices". *Brandon v. Holt*, 469 U.S. 464, 474, 105 S.Ct. 873, 879, 83 L.Ed.2d 878 (1985) (Burger, C.J., concurring in judgment).

Petitioners' argument that Respondents acknowledged their representative capacities by raising an affirmative defense challenging their standing as heirs is also without merit. On the contrary, Respondents' failure to have raised the issue by way of negative averment in the answer could have resulted in a waiver of such a defense. *F.R.Civ.P.*, Rule 9(a).

Moreover, the decision in this case does not create a conflict of interest between the circuits. Petitioners cite *Baker v. Putnal*, 75 F.3d 190 (5th Cir. 1996) for the proposition that capacity to sue need not be stated in the complaint. However, unlike the Fifth Circuit's consideration of the issue at the initial pleading stage on a 12(b)(6) motion, Petitioners continue to ignore the fact that the instant case was decided at the pretrial conference stage by application of Rule 16. The basis of a claim must be identified in the pretrial order with specificity and, here, it was not identified at all. *Hullman v. Board of Trustees of Pratt Comm. College*, 950 F.2d 665, 668 (10th Cir. 1991).

Contrary to Petitioners' newly raised argument under Rule 8, the lower courts examined whether or not Petitioners had properly alleged their standing to bring a survival action in the controlling pretrial order. Virtually every circuit has agreed that *F.R.Civ.P.*, Rule 16(e) provides that the pretrial order shall supersede the pleadings and that failure to specifically raise theories in the pretrial order which might have been previously raised in the pleadings shall amount to abandonment of those theories. *McGinnis v. Ingram Equipment Co., Inc.*, 918 F.2d 1491, 1494 (11th Cir. 1990); *Hotel Employees, et al. v. Elks Lodge 1450*, 827 F.2d 1324, 1329 (9th Cir. 1987).

In the relevant portions of the pretrial order provided herewith by Respondents, it becomes clear that Petitioners did not include any suggestion that they intended to act in any sort of representative capacity in section 2, pertaining to jurisdiction, or in section 8, addressing remaining issues of law. Appendix 1. Petitioners' suggestion that a casual footnote in the pretrial order referencing all prior pleadings might be sufficient to preserve all issues raised by those pleadings would effectively render Rule 16(e) meaningless. Confirming that issues not specifically raised as justiciable issues in the pretrial order shall be waived, the court in *Roland M. v. Concord School Comm'n*, 910 F.2d 983, 998-999 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1990), noted:

> "Pretrial orders are valuable accouterments to the judicial process. They define, simplify, and limit the issues to be decided, reduce error, prevent surprise, promote judicial economy, and encourage settlement. If pretrial orders are to continue to serve these laudable ends, courts and litigants must ordinarily take them seriously. A final pretrial order should say what it means and mean what it says". *Ibid.*

Before determining that Petitioners must be held to the language of their own pretrial order, the district court noted that throughout trial Petitioners had maintained a position of advantage by denying the existence of any survival claims. It was only after the issue of standing was raised by summary judgment at the close of evidence that Petitioners suddenly attempted to amend their pretrial order to include a survival action. Exercising its sound discretion, the district court denied Petitioners'

eleventh hour plea and the existing pretrial order was enforced.

The district court is given broad discretion in supervising the pretrial phase of litigation, and its decisions regarding the preclusive effect of a pretrial order will not be disturbed unless they evidence a clear abuse of discretion. *Miller v. Safeco Title Ins.*, 758 F.2d 364, 369 (9th Cir. 1985). Consistent with other circuits, the Ninth Circuit exercised "minimal interference" with the "broad discretion" of the lower court to preserve the integrity and purpose of its pretrial order. *Roland M., supra*, 910 F.2d at 999. An appellate court should not lightly relieve a litigant from the condign consequences of its failure to list a theory of recovery at the critical stage of the pretrial order. *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1195 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 1423 (1996).

Although Petitioners seem to have abandoned their attempt to amend the pretrial order addressed by the lower courts, Rule 16(e) only permits modification of the final pretrial order to prevent manifest injustice. Not only did Petitioners rely on the nonexistence of any survival action during trial, "carelessness is not compatible with a finding of manifest injustice and offers no reason for a grant of relief". *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Petitioners' attempt to amend their pleading or the pretrial order at the close of evidence is simply inconsistent with the Federal Rules:

> "A district court's decision to honor the binding terms of its pretrial order does not simply exalt procedural technicalities over the merits of a case. 'Disregard of the order would undermine the court's ability to control its docket, disrupt

> the agreed upon course of the litigation, and reward the indolent and the cavalier. Rule 16 was drafted to prevent this situation and its standards may not be short circuited by an appeal to those of Rule 15' or any other pleading rule which precedes the pretrial order." *Johnson*, 975 F.2d at 610.

Given that the lower courts simply exercised sound discretion in the application of the Federal Rules, it is respectfully urged that certiorari need not and should not be granted on the related issues and that the decisions of the lower courts excluding any survival actions be left undisturbed.

2. PETITIONERS, AS SPOUSE AND MOTHER OF AN ADULT DECEDENT, DO NOT HAVE SEPARATE STANDING UNDER THE 14TH AMENDMENT.

At the close of evidence, Petitioners agreed that the only individual claims they could maintain, if any, would arise out of the 14th Amendment. Relying heavily on *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987), *cert. denied*, 484 U.S. 935 (1987), Petitioners assert that they have standing to bring their own separate 14th Amendment claims for loss of a familial relationship with decedent.

However, virtually every case relied upon by Petitioners involved the recognition of such claims as between a parent and a *minor* child. In no case cited by Petitioners has any court extended a separate 14th Amendment claim to the relatives of an *adult* decedent, such as here. This Court has recognized 14th Amendment claims when the government interferes with the family unit because "the protections of substantive due process

have for the most part been accorded to matters relating to marriage, family, procreation, and the right of bodily integrity". *Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 812, 127 L.Ed.2d 114 (1994).

Here, on the other hand, the "constitutional interest both in controlling the details of the child's upbringing . . . and in retaining custody and companionship of the child" no longer exist. *Ortiz v. Burgos*, 807 F.2d 6, 8 (1st Cir. 1986), citing *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 38-39, 101 S.Ct. 2153, 2165, 68 L.Ed.2d 640 (1981). The notion of forever extending 14th Amendment claims to surviving family members was appropriately limited in *Ortiz:*

> " . . . a conclusion that governmentally caused termination of the parental interest in the continued relationship with a child always is actionable would constitutionalize adjudication in a myriad of situations we think inappropriate for due process scrutiny, including the alleged wrongful prosecution and incarceration of a child." *Ibid.*

Since, however, the lower courts presumed the existence of such 14th Amendment claims on behalf of these two Petitioners, resolution of this issue is really not necessary in this case.

3. THE LOWER COURTS PROPERLY ANALYZED PETITIONERS' SEPARATE AND DISTINCT 14TH AMENDMENT CLAIMS UNDER THE "DELIBERATE INDIFFERENCE" STANDARD.

Assuming the existence of separate and distinct 14th Amendment claims for each of the Petitioners, the lower

courts followed well established history and precedent by analyzing those claims under the "deliberate indifference" standard. Respondents do not disagree that decedent's survival claim for excessive force *(if it existed)* would have been properly analyzed under the "reasonableness" standard of the 4th Amendment. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).[2]

The first inquiry in any 42 U.S.C. § 1983 suit is to isolate the precise constitutional violation which is at issue. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). Petitioners argue that, because the conduct of the Respondents arises out of underlying claims of excessive force, all claims in the action must be analyzed under the "reasonableness" standard of *Graham*. Rather, this Court in *Graham* rejected the notion that all excessive force claims brought under § 1983 are governed by a single generic standard. 490 U.S. at 393, 109 S.Ct. at 1870.

In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. *Graham, supra*, 490 U.S. at 394, 109 S.Ct. at 1870. In this case, Petitioners do not dispute that their own claims arise exclusively out of the 14th rather than the 4th Amendment. As such, the validity of their claims

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[2] During trial, Petitioners stipulated that they were not bringing any 4th Amendment claims of their own. As previously noted, Petitioners also indicated at trial that their claims, if at all, arose out of the 14th Amendment.

must then be judged by reference to the specific constitutional standard which governs that right, rather than some generalized "excessive force" standard. *Id.*

This Court has since determined that *Graham* does not hold that all constitutional claims relating to physically abusive government conduct must arise under the 4th Amendment. *U.S. v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 1228 n.7, 137 L.Ed.2d 432 (1997). This Court has also continued to reject Petitioners' suggestion that the analysis of all constitutional claims is necessarily conduct based. In *Soldal v. Cook County, Ill.*, 506 U.S. 56, 70, 113 S.Ct. 538, 548, 121 L.Ed.2d 450 (1992), this Court recognized that:

> "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."

Even if Petitioners had properly alleged a survival action as well as their own separate and distinct 14th Amendment claims, it does not follow that the 4th Amendment standard applicable to the survival action must somehow be extended to completely separate claims arising out of a different, but applicable, amendment. This Court has rejected the view that the application of one constitutional amendment preempts the guarantees of another. The proper question is not which amendment controls, but whether either amendment is violated. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 49-50, 114 S.Ct. 492, 499, 126 L.Ed.2d 490 (1993). *Graham* does not

provide support for the proposition that the 4th Amendment is the beginning and end of the constitutional inquiry whenever a seizure occurs. *Ibid.*[3]

The lower courts properly applied the "deliberate indifference" analysis to Petitioners' separate and distinct claims for loss of a familial relationship with decedent. In one of the few cases specifically addressing such claims and cited by Petitioners, the court in *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991), *cert. denied*, 506 U.S. 972, 113 S.Ct. 460, 121 L.Ed.2d 369 (1992) noted:

> "While the person who claims excessive force was directed at him or her can only raise a 4th Amendment claim, a parent who claims loss of companionship and society of his or her child, or vise versa, raises a different constitutional claim." (emphasis added).

In one of the only other cases addressing separate claims for loss of a familial relationship under the 14th Amendment in excessive force cases, the Ninth Circuit properly recognized that such claims must be analyzed under a different standard than the 4th Amendment claims of excessive force:

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[3] In several other contexts, this Court has recognized that different standards can apply to the same governmental conduct. [*e.g.*, The standard for analyzing a claim of invidious discrimination differs from the analysis of the same claim under Title VII. *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976); A prisoner's claim of negligence in a medical malpractice action would be analyzed under a different standard than his 8th Amendment claim for cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).]

> "We have concluded such claims are *not* based on derivative rights, but rather assert an independent violation of a survivor's personal federally protected rights." *Crumpton v. Gates*, 947 F.2d 1418, 1420-21 (9th Cir. 1991).

The court in *Crumpton* went on to note that:

> "The substantive constitutional injury upon which Crumpton relies is *not* a 4th Amendment interest in freedom from unreasonable force, but a substantive due process liberty interest in having familial relations with parents . . . whether or not Crumpton's father may have sustained a constitutionally cognizable 4th Amendment deprivation when shot by police . . . Crumpton *cannot* assert his father's 4th Amendment rights." *Ibid.*

In both *Crumpton* and the instant case, the Ninth Circuit has properly determined that Petitioners cannot vicariously assert decedent's 4th Amendment claims of excessive force and that their separate and distinct 14th Amendment claims must be analyzed under a substantive due process standard. *Rakas v. Illinois*, 439 U.S. 128, 133-134, 99 S.Ct. 421, 425, 58 L.Ed.2d 387 (1978). *Cf. Salazar v. Chicago*, 940 F.2d 233, 238 (7th Cir. 1991).

Most recently, this Court has indicated that the substantive component of the due process clause of the 14th Amendment is violated by action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. *County of Sacramento v. Lewis*, 521 U.S. ___, 118 S.Ct. 1708, 1717 (1998). Given the choice between a 4th Amendment analysis and a 14th Amendment analysis in *Lewis*, this Court correctly concluded

that "shocks the conscience" is the right choice. *Id.*, 1721 (C.J. Rehnquist, concurring).

Simply because Petitioners now retrospectively seek to have their separate 14th Amendment claims analyzed under the rubric of a single and lesser excessive force standard is no reason to grant certiorari. Petitioners' claims, if at all, arose exclusively out of the 14th Amendment and this Court has always declined to trivialize the due process clause in an effort to simplify constitutional litigation. *Daniels v. Williams*, 474 U.S. 327, 335, 106 S.Ct. 662, 667, 88 L.Ed.2d 662 (1986). Following the history and precedent of the 14th Amendment, the Ninth Circuit properly analyzed these claims for loss of familial relationships the substantive due process standard of "deliberate indifference". *Cf. Rhyne v. Henderson County*, 973 F.2d 386 (5th Cir. 1992). Applying this standard to the evidence presented at trial, the lower court properly determined Petitioners had failed to meet their burden of proof on their remaining claims.

Finally, Petitioners' attempt to create the illusion of a conflict between the circuits mistakenly relies on *Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996). In *Salim*, Plaintiffs, unlike these Petitioners, properly sued in their representative capacity of the estate for their *minor* son killed by police. More importantly, however, the application of the 4th Amendment "reasonableness" standard was proper because Plaintiffs never alleged any 14th Amendment loss of a familial relationship and the issue was never addressed by the court. As such, there is no need to grant the petition for certiorari.

CONCLUSION

Respondents appreciate the Court's invitation to file this brief and, for the reasons set forth above, respectfully urge that the Petition for Writ of Certiorari be denied.

FERGUSON, PRAET & SHERMAN
A Professional Corporation

BRUCE D. PRAET, *Counsel of Record*

Attorneys for Respondents,
Vic Cantu, Mark Van Holt and
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APPENDIX 1

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELLEN BYRD, et al., Plaintiffs, against JAMES GUESS, et al., Defendants.	No. Civil-93-523-TJH PRETRIAL CONFERENCE ORDER Pretrial Conference Date: April 25, 1994 Time: 10:00 A.M. Place: Courtroom 17

[This Pretrial Conference Order mirrors the form that is set forth at Appendix A to the Local Rules of the United States District Court for the Central District of California.]

Following Pre-Trial proceedings, pursuant to Rule 16, F.R. Civ. P. and Local Rule 9, IT IS ORDERED:

1. The parties are: (list)

Plaintiffs, Ellen Byrd and Vivian Harkness

Defendants are Mark VanHolt, Vic Cantu, City of Los Alamitos

Each of these parties has been served and has appeared.[1] All other parties named in the pleadings and not identified in the preceding paragraph are now dismissed.

The pleadings which raise the issues are: (list)

The Second Amended Complaint and the Answer thereto.

2. Federal jurisdiction and venue are invoked upon the grounds: (Concise statement of facts necessary to confer federal jurisdiction and venue. State whether the facts requisite to federal jurisdiction are denied or admitted.) It is alleged that defendant or defendants acted under color of state or federal law and deprived plaintiff or plaintiffs of rights secured by the United States Constitution and/or laws of the United States of America, and that this Court has subject matter jurisdiction of this case pursuant to the United States Constitution, 28 U.S.C. 1331 (general federal question jurisdiction), and 28 U.S.C. 1343 (civil rights jurisdiction). It is alleged that the wrongful acts complained of occurred in this federal district, and that therefore, venue lies in this federal district court pursuant to 28 U.S.C. 1391. The plaintiff or plaintiffs assert the facts of federal subject matter jurisdiction and venue, and the defendant or defendants take the following position as to those facts (admit or deny): admit.

* * *

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[1] If any party either has not been served or has not appeared, his or her name is set forth here:

6. The following facts, although stipulated, shall be without prejudice to any evidentiary objection: that is, these facts will not be contested if evidence of them is admitted: none.

7. The following issues of fact, and no others, remain to be litigated at the trial: (set forth facts to be litigated).

The plaintiff or plaintiffs contend that the following facts remain to be litigated:[2]

1. Intentionally omitted.

2. Whether the alleged police conduct subjected plaintiff or plaintiffs to a deprivation of any federal rights.

3. Whether there is any practice, policy, custom, or habit of police conduct which includes or fosters or condones the conduct alleged against the police herein.

4. Whether any person or entity who was not the actual or immediate cause of the violation of federal rights alleged is legally responsible for the alleged violation of federal rights.

5. Whether any alleged conduct occurred as a result of callousness, recklessness, wantonness, gross negligence, maliciousness, deliberate indifference, or indifference to federal rights.

6. Whether or not there was any conspiracy.

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[2] Plaintiff or plaintiffs incorporate in this paragraph by this reference all issues raised in the operative complaint and in the Memorandum of Contentions of Fact and Law.

The defendant or defendants contend that the following facts remain to be litigated:

1. Whether Plaintiffs' decedent acted in a manner so as to bring about his own death.

2. Whether the law was clearly established.*

3. Whether the alleged force used was reasonable.

4. Whether the Defendants were objectively unreasonable in light of the facts and circumstances at the time.**

5. If any unconstitutional conduct occurred, whether it was pursuant to a custom, policy or practice of the City.

6. Whether Plaintiffs suffered any damages.

8. The following issues of law, and no others, remain to be litigated at the trial: (set forth issues of law.)

The plaintiff or plaintiffs contend that the following issues of law remain to be litigated:[2]

1. Is the alleged police conduct violative of federal law?

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* Plaintiffs contend that whether the law clearly was established is not an issue of fact, and, if it is an issue at all, it is an issue of law.

** Plaintiffs contend that in this excessive force case, there is no separate issue as to qualified immunity, and the qualified immunity issue is part of the excessive force determination. *See, e.g., Hopkins v. Andaya*, 958 F.2d 881, 885 n. 3 (9th Cir. 1992); *Hamilton v. Endell*, 981 F.2d 1062 (9th Cir. 1992) (deliberate indifference finding necessarily precludes finding of qualified immunity).

2. Is any person or entity other than the person or persons who actually or immediately caused the alleged violation legally liable for the violation?

3. Is imposition of punitive damages warranted?

4. Is an award of attorneys' fees warranted?

5. Is California Government Code Section 825(a) applicable?

6. Is California Government Code Section 825(b) applicable?

Defendants disagree that Nos. 4 and 5 are properly issues*

* * *

15. The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this Pre-Trial Conference Order shall supersede the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: December 13, 1993.

TERRY J. HATTER, JR.
UNITED STATE DISTRICT JUDGE

* Plaintiffs acknowledge that, in light of the Ninth Circuit's recent, February 22, 1994, opinion in *Larez v. Holcomb*, 91-55822 (9th Cir. 2/22/94), plaintiffs may pursue this issue only to preserve it for appellate review.

Approved as to form and content.

YAGMAN & YAGMAN, P.C.

By: /s/ Stephen Yagman APR 13 1994
STEPHEN YAGMAN
Attorneys for plaintiff or plaintiffs

Approved as to form and content:

FERGUSON, PRAET & SHERMAN
A Professional Corporation

By: /s/ Bruce D. Praet
Bruce D. Praet, Attorneys
for Defendants

Dated April 12, 1994